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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE: B-187026**

**DATE: November 3, 1976**

**MATTER OF: Stauffer Construction Co., Inc.**

**DIGEST:**

Protest which concedes that low bidder clearly and convincingly established existence of mistake in bid and of bid actually intended, but contends that contracting officer should be "estopped" from permitting correction because exercise of his discretion in this manner conflicted with alleged unwritten agency policy never to permit correction, is denied because elements of equitable estoppel have not been shown to exist.

Through invitation for bids (IFB) No. 0709-AA-02-0-6-CC, the Department of General Services, District of Columbia (District) sought bids for an addition to and modernization of the Charles Young Elementary School. Of the five bids opened on June 18, 1976, the lowest was submitted by Kora & Williams Corporation (\$2,629,500) and the second low bid in the amount of \$2,822,222 was submitted by Stauffer Construction Company, Inc.

Shortly after bid opening, Kora & Williams advised the District that its bid price was in error and requested correction. On June 25, 1976, Stauffer protested to the District "any award of a contract \* \* \* to the firm of Kora & Williams Corporation, based on reformation of their original bid." By letter of July 19, 1976, which we received on July 22, Stauffer protested to our Office in the same terms as it had protested to the District. In neither instance did Stauffer elaborate upon its rationale for protesting.

On July 22, 1976, the contracting officer determined that Kora & Williams had submitted clear and convincing evidence of the error, the manner in which it occurred and the amount of the intended bid price. Therefore, he allowed correction of Kora & Williams' bid to the requested amount of \$2,759,500 at which price that firm remained low. Four days later the District's Contract Review Committee concurred in the contracting officer's action.

The protester then obtained from the District the documents Kora & Williams had submitted to the District in support of its request for correction. Based on its examination of these documents, the protester states that it "does not contend that there was a lack of 'clear and convincing' evidence of the existence of a mistake and of the amount of the bid actually intended." However, it asserts that in past years the procuring agency had followed a "rigid practice of rejecting any and all attempts to reform bids allegedly containing errors" which had become such a "firm reliable policy" as to supercede published regulations permitting correction.

The protester then states that in some unspecified manner it "prepared and submitted its bid \* \* \* in reliance upon" this unwritten policy; that the District's departure from this alleged policy was "to the detriment" of the protester; and that, therefore, the District should "be estopped" from making award to Kora & Williams. However, the District has proceeded with award despite the pendency of this protest.

It has been stated that:

"Broadly speaking, the essential elements of an equitable estoppel or estoppel in pais, as related to the party to be estopped, are : (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. Whether these elements are present, and whether the doctrine of equitable estoppel should therefore be applied, in a particular case, depends,

of course, upon the facts and circumstances of that case, and, manifestly, there can be no equitable estoppel if any essential element thereof is lacking or is not satisfactorily proved," (Emphasis added.)

28 Am. Jur. 2d Estoppel & Waiver § 35 (1966) (footnotes omitted). Also see Fink Sanitary Service, Inc., 53 Comp. Gen. 502, 506 (1974), 74-1 CPD 36.

Acceptance of the protester's argument would have the incongruous result of prohibiting the District from permitting correction of a mistake in bid which even the protester concedes is clearly and convincingly established. Apart from that, and even assuming that the doctrine of equitable estoppel may be applied in this situation, we believe the protest must be denied because all the elements of estoppel have not been shown to exist.

Insofar as the District is concerned, the protester has not shown that an unwritten policy invariably prohibiting correction of alleged mistakes in bids did in fact exist. Even if the existence of such a policy is conceded for the purpose of argument, the protester has not shown that the policy was adopted with the expectation of influencing the protester's actions with respect to this invitation for bids.

Insofar as the protester is concerned, the observation could be made that the protester was placed on notice prior to the submission of its bid that the policy which it alleges existed would no longer be applied. In a decision of this Office which preceded the instant procurement, another protester had alleged that "the District had adopted a policy which permits withdrawal of erroneous bids, but effectively prohibits their correction under any circumstances." Although the existence of such a policy was not established by the record in that case, we observed:

"We think the decision to permit withdrawal or correction is within the discretion of the agency, but that such discretion must be exercised on a case by case basis in accordance with the rules [governing correction of mistakes in bids] rather than on a broad policy basis."

Asphalt Construction, Inc., 55 Comp. Gen. 742, 743 (1976), 76-1 CPD 82. It was therefore clear before the protester submitted

its bid that our Office disapproved of any policy of the type which the protester alleges existed.

Finally, the protester has failed to show that in reliance upon the alleged policy it took or refrained from some action which changed the protester's position or status, its injury, detriment or prejudice. The protester makes the general allegation that it "prepared and submitted its bid \* \* \* in reliance upon" the alleged policy and that the District's later departure from that policy was "to the detriment" of the protester. This, however, is not sufficient to create an estoppel.

In general:

"\* \* \* not only must the party claiming an estoppel have believed and relied upon the words or conduct of the other party, but also he must have been thereby induced to act, or to refrain from acting, in such a manner and to such an extent as to change his position or status from that which he would otherwise have occupied."

28 Am. Jur. 2d Estoppel & Waiver § 77 (1966) (footnotes omitted). The protester has presented no evidence to show that the bid which it submitted was different in any way from that which it would have submitted had the alleged policy not existed. We do not see how the protester could have been led by the alleged policy to have changed its position to its detriment.

In view of the protester's failure to establish the necessary elements of an estoppel, the protest is denied.

  
Deputy Comptroller General  
of the United States